IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1425

NORTHERN HELEX COMPANY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITIONER'S REPLY BRIEF

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In its Brief in Opposition ("Opp."), respondent fails to address squarely the questions actually presented by the Petition, incorrectly states that the Court of Claims complied with its Rule 147 and misconceives the basis of the Court of Claims decision. The Brief Amicus Curiae of the Bar Association of the District of Columbia and the Petition show that this case does present questions of great importance.

I.

RESPONDENT MISCONSTRUES THE RULE 147 QUESTIONS AS SIMPLY MATTERS OF FORM. (Opp. 1, 7-9)

A. Respondent misstates the issue raised in the Petition as being whether the Court of Claims violated its Rule "by not stating separately the facts" and whether

the Court "departed from the form of opinion prescribed by its rules" (Opp. 1, 9). The questions actually presented are whether the Court of Claims may (1) disregard its Rule 147(a) and depart from its 110-year procedure by not adopting or making any *findings of fact* and (2) summarily disregard its Trial Judge's findings of fact notwithstanding the presumed correctness of such findings under Rule 147(b).

As pointed out by respondent (Opp. 8) and petitioner (Pet. 16), the statutory requirement for the Court of Claims to find the facts was deleted in the codification of Title 28 in 1948.[1] However, it is a violation of Rule 147—not of the statute—that is involved in this Petition, and that Rule requires the Court of Claims to find the facts.[2]

The function of finding the facts is vastly different from stating some facts in an opinion. The former involves an examination of the entire record and the finding of those facts which have been proved by the evidence. The latter involves nothing more than the selection and statement of the facts which the Court feels are appropriate for the analysis in the opinion. One of the main purposes of requiring findings of fact

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[1] The reason given in the Reviser's Notes for deletion was: "Covered by Rules 52 and 75 of the Federal Rules of Civil Procedure." See Pet. 16 n. 9 for history of statutory requirement.

[2] Findings of fact have been a requirement since this Court promulgated its Rules applicable to review of Court of Claims decisions in 1866. Under those Rules, appeals would be heard on:

> "2. A finding of the facts in the case by the said Court of Claims, and the conclusions of law on said facts on which the court founds its judgment or decree. The finding of the facts and the conclusion of law to be stated separately and certified to this court as part of the record. (1 Ct. Cl. XIX (1863-1865))."

is to provide the parties and reviewing court with the means of determining whether the trial court's factual analysis and conclusions in the opinion are supported by the underlying facts in the record. A statement in the opinion no more constitutes a finding of fact under Rule 147(a) than it did under the earlier statutory requirement. This Court's decision in *United States* v. *Causby*, 328 U.S. 256, 267 (1946), therefore, is applicable. In *Causby*, this Court held:

> "* * * It is true that the Court of Claims stated in its opinion that the easement taken was permanent. But the deficiency in findings cannot be rectified by statements in the opinion."

Just as the statute required findings of fact, in *Causby*, so does Rule 147(a) here.

The Court of Claims did not purport to and did not find the facts in accordance with Rule 147(a). Instead, the Court stated some selected facts and assumed others relevant to the decision, which is the technique used for motions and other cases not tried on the facts. Clearly, that technique does not comply with Rule 147(a) which relates to cases tried on the facts.

Because findings of fact are a judicial safeguard against arbitrary and erroneous decisions, the fact-finding function is important in all cases tried on the facts. This safeguard is critical in the Court of Claims because it is the court created to hear and decide large and complex cases against the United States, and there is no review of its decision except by this Court on writ of certiorari. In the Brief Amicus Curiae of the Bar Association of the District of Columbia, the Amicus states:

> "* * * The sole interest of *Amicus* in this litigation is to communicate to the Court the overwhelm-

ing importance and seriousness of plaintiff's petition as it relates to the failure by the Court of Claims to follow its own Rule 147(a)." (Amicus 1).

"The importance of the court's failure to make proper findings of fact, in accordance with its Rule 147(a), cannot be overstated." (Amicus 3).

B. The question presented with respect to Court of Claims Rule 147(b) goes to the fundamental requirement that the Trial Judge's findings of fact are presumed to be correct and can be set aside: "* * * only by a strong affirmative showing * * *"; *Bonnar* v. *United States,* 194 Ct. Cl. 103, 146, 438 F.2d 540, 563 (1971). (Pet. 20-22). Rule 147(b) is not complied with by stating, as the Court of Claims did here, that: "The facts necessary for our decision are included in this opinion," and "[t]he findings of fact and recommended decision of Trial Judge Louis Spector have been helpful, but we reach a somewhat different result." (Pet. App. 3, n. 1).

Respondent suggests that the Court adequately "explicated" the factual predicate for its conclusions on foreseeability, and that the undisputed nature of many of the facts justify the Court's deleting all of the Trial Judge's findings of fact and not explaining why it thought he erred in his findings and conclusions on the most crucial facts. (Opp. 8-9). This is not correct. The *undisputed* facts show that (aside from petitioner's contractual obligation to remove the helium from Northern's gas, discussed *infra* at p. 8) the substantive reason why the $43 million cost of continued operation of the helium plant must be incurred is because the helium plant is inextricably integrated with LPG and petrochemical operations and that the Government

foresaw that integration. The Trial Judge concluded, with detailed supporting findings, that such inextricable integration:

"* * * was contemplated by the parties as the most practical method of implementing their respective plans. It was encouraged by defendant for the mutual benefit of the parties and it was expressed in a contract provision." (Pet. App. 147).

"* * * These integration plans, discussed, endorsed and encouraged by defendant's representatives in their negotiations with Northern, were major criteria in Northern's decision to participate in the conservation program." (Pet. App. 148).

In the face of the undisputed facts, and the Trial Judge's conclusion and findings, the Court of Claims, over a strong dissent, concluded that the Government could not possibly have foreseen such integration (Pet. App. 13). This conclusion was stated without any mention of the *undisputed* evidence which overwhelmingly showed that at the time the contract was entered into the Government actually contemplated the very type of integration achieved by petitioner. Such an arbitrary conclusion of the Court of Claims illustrates the importance of requiring that Court to comply with its Rule 147.

C. Respondent correctly points out that this case is not an isolated instance of the Court of Claims violating Rule 147. (Opp. 7). The Court of Claims has recently departed from its 110-year procedure of adopting or making findings of fact, and has begun a dangerous trend of ignoring Rule 147(a) and (b) in selected cases. The significance of this trend to the United States is brought into sharp focus by visualizing the Court of Claims entering judgment for petitioner or

anyone else in the amount of $80 million without findings of fact. Compare *United States* v. *Penn Foundry & Manufacturing Co., Inc.*, 337 U.S. 198 (1949). Arbitrariness or carelessness can work an injustice to either party. Findings of fact provide greater assurance to both parties that a decision has been rendered in accordance with the evidence and the law. Such a dangerous trend initiated by the Court of Claims should be confronted by this Court now and stopped.

Unlike other federal courts, the number of cases filed in the Court of Claims has decreased over the last 20 years.[3] While the cases filed have decreased, Court membership has increased from five to seven judges and the Court now has the benefit of Trial Judges' opinions in all cases tried on the merits. 28 U.S.C. § 175; Court of Claims Rule 134(h), 28 U.S.C. There is no need to sacrifice findings of fact for expedition in the Court of Claims. The federal district courts have concurrent original jurisdiction with the Court of Claims in tax cases, and in other cases not exceeding $10,000. 28 U.S.C. § 1346. The failure of the Court of Claims to comply with its Rules and to demonstrate that its decisions have been rendered on a reasoned and judicious basis will inevitably defeat the purpose for the existence of the Court of Claims and cause more litigants to select the already overcrowded federal district courts with the right of appeal to the Court of Appeals. It is imperative that this Court, the only Court having jurisdiction to do so, require the Court of Claims to comply with its Rules.

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[3] Annual Report Of The Director Of The Administrative Office Of The United States Courts, 1955, p. 248; 1956, p. 296; 1957, p. 260; 1958, p. 232; 1959, p. 268; 1960, p. 346; 1965, p. 245; 1970, p. 308; 1975, p. 473.

II.

RESPONDENT MISCONCEIVES THE BASIS OF THE COURT OF CLAIMS DECISION. (Opp. 5-7)

A. Respondent incorrectly asserts that the judgment of the Court of Claims rests not on the factual question of foreseeability but on the specific language of Article 31.3 of the contract. (Opp. 5). The Court of Claims decision is so confusing that it is impossible to discern on what basis the decision rests.[4] The Court of Claims and respondent have struggled to read Article 31.3 as exonerating the Government from liability for its breach of contract when (1) the specific terms of the clause, (2) the intention of the parties, and (3) the rules of construction are all to the contrary.

1. Article 31.3 simply and plainly grants permission to petitioner, at its own risk and expense, to construct and operate facilities *for extracting products other than helium*. The specific terms of Article 31.3 make it inapplicable to the risks and costs of operating facilities *for extracting helium,* which is what petitioner is incurring $43 million in unavoidable costs for doing. (Pet. App. 8, 148).

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[4] The Court of Claims made a number of confusing and irrelevant "holdings" and its "holding" on Article 31.3 is one of them. Preceding that "holding", the Court "held" that performance costs are the sole responsibility of the seller. (Pet. App. 10). That is true, except where, as here, the buyer breaches the contract, in which event foreseeable unavoidable performance costs are part of damages. Likewise, the Court seems to have held that because the Government did not actually agree to be liable for the damages represented by the cost of continued performance, it is not liable for them. (Pet. App. 13). This, of course, is incorrect. Damages are a remedy provided by law and are not a matter of intention of the parties. (5 Corbin, Contracts, § 1010; 22 Am. Jur. 2d, Damages, § 57; Restatement of the Law, Contracts, § 330, Comment a).

Petitioner contractually obligated itself to Northern to operate the helium plant through July, 1983 *to extract helium* from Northern's gas stream in exchange for Northern's agreement to supply petitioner with the helium-bearing natural gas required to perform its contract with Interior. (Pet. App. 148). As the Court of Claims stated: "* * * The contract between the plaintiff and Northern is in evidence and only requires the plaintiff to extract helium." (Pet. App. 8). In short, the $43 million is being incurred *to extract the helium* and there is absolutely nothing in Article 31.3 which excuses, exonerates or absolves the Government from paying those unavoidable costs as part of the damages for its breach of contract. Thus, the specific terms of the contract do not support the Court of Claims or the respondent.

2. The record clearly shows that Article 31.3 was not intended to absolve the Government from any damage for its breach of contract. (Pet. App. 148-149). The Government encouraged integration of the helium plant with LPG and petrochemical operations for the mutual benefit of the parties and for this reason agreed to a termination article severely restricting its right to terminate the contract. It is incredible to suggest that the parties then agreed to give the Government the right to breach the contract without obligation for the cost impact thereof. Article 31.1 simply allocates risks and costs on the assumption the contract is performed. It is directly analogous to Article 4.1 which places the risk and expense of constructing and operating the Government's pipeline for the transportation of helium to storage on the Government. (Pet. App 148-149). It does not exonerate the Government for damages flowing directly from its breach.

3. Moreover, the law is clear that unless the contract provision expressly states that a party is to be exonerated from liability for damages caused by its breach of contract, it is not to be construed in derogation of the injured party's customary right to be fully compensated for its damages. The applicable rule of construction is that:

> "* * * [Clauses] intended to exempt a party from liability in respect of his own fault are strictly construed against him, and, where a contract is against a common-law liability, it should be strictly construed and not given an enforcement beyond that required by such construction." 17A C.J.S., Contracts, § 294, pp. 39-40; see also, § 319, pp. 194-195.

See *Fox Valley Engineering, Inc.* v. *United States,* 151 Ct. Cl. 228 (1961) (Holding a provision that "the Contractor shall assume all risks in connection with the execution of this contract and waive any claim against the Government for damages arising out of performance of the work * * *" cannot possibly be construed to insulate the Government for all acts which might constitute breaches of contract); cf. *Bisso* v. *Inland Waterways Corp.,* 349 U.S. 85 (1955) (In a towing contract, a clause stating that towing movement would be at "sole risk" of barge did not exonerate tugboat from liability). Thus, under the rules of construction Article 31.3 does not absolve the Government from liability for its own breach.

B. The arbitrariness of the Court of Claims decision on the factual issue of foreseeability of the inextricable integration is set forth in the Petition (Pet. 22-26) and *supra* at pp. 4-5. Respondent's suggestion that the Government did not have sufficient reason to fore-

see the *degree* of integration or harm is incorrect. As respondent recognized, the removal of LPG and ethane (high BTU constituents) requires removal of the helium and nitrogen (the inerts) in order to maintain the heating value of the natural gas. (Opp. 3; Pet. 4). The Government knew from its own helium extraction operations that nitrogen could be removed only by operating the helium plant. For this very reason the Government attracted Northern and other owners of rich helium-bearing gas into the conservation program by expressly offering them the opportunity to extract LPG and ethane for petrochemical operations through the nitrogen removal capability provided by a helium plant. (Pet. 22-26). Thus, the Government knew from the outset of the contractor's probable inextricable integration of the helium extraction with LPG and petrochemical operations.

The Trial Judge found that this interdependency of petitioner's helium extraction facilities with its other natural gas and petrochemical operations was foreseeable, and indeed was contemplated and encouraged, by the Government. (See Finding 26, App. 174-175; Finding 30, App. 175-176; Finding 40, App. 179; Finding 75, App. 206; Finding 79, App. 207-208; Findings 94-96, App. 214-215). The Trial Judge held, therefore, that petitioner could not avoid any costs of performance and awarded it the full contract price.

The Court of Claims completely ignored the facts showing what the parties actually contemplated before and *at the time the contract was entered into,* and instead dwelled on the details implementing the contemplated integration plan and *assumed* those details could not have been foreseen. (Pet. App. 12-13). Such a level of judicial action manifested in this case by the

Court of Claims calls for the exercise of this Court's supervisory power.

C. In its argument on the Uniform Commercial Code, respondent overlooked the fact that petitioner had already "bought" all the raw material. In order to perform its 22-year contract with the Government, petitioner had to have a firm 22-year contract with Northern to acquire the helium from Northern's gas stream. In exchange for its 22-year right to extract the helium for sale to Interior, petitioner obligated itself to process and remove the helium from Northern's gas until July 28, 1983. This contractual commitment to operate the helium facilities until July 28, 1983, and the resulting costs, represent the cost incurred by petitioner to acquire the helium (the raw material) necessary to perform its 22-year contract with the Government. The fact those costs are being incurred over a period of years rather than in a lump sum is irrelevant; they cannot be avoided and are a part of petitioner's damages.

CONCLUSION

The Court of Claims is an important part of our judicial system, and when it disregards one of its most basic rules in the largest case in its entire history, the Supreme Court, as the only court having jurisdiction to review decisions of the Court of Claims, must reverse the judgment and remand the cause to the Court with directions to comply with its Rule 147. *United States* v. *Penn Foundry & Manufacturing Co., Inc.,* 337 U.S. 198 (1949); *United States* v. *Causby,* 328 U.S. 256 (1946); *Seminole Nation* v. *United States,* 316 U.S. 286, 300 (1942).

Respectfully submitted,

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